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2007 Interim Committee

Freedom of Information, Open Meetings, and Public Records Study Committee

Comments by David Vestal, ISAC General Counsel

September 6, 2007

Thank you for the opportunity to make a few remarks.

I am David Vestal, general counsel for the Iowa State Association of Counties.

Before I begin, let me tell you where I am coming from on this issue. I have a master's degree in journalism. My last job before coming to ISAC was as a newspaper reporter covering local government. So I realize how important transparency is. I am an advocate for transparency. Government works better in the sunshine.

But helping county officials work with these laws every day, I also realize that the laws have to be tempered with some common sense.

Do these laws need to be completely rewritten? No. But they do need to be updated.

I've visited with my counterparts at the school board association, and the league of cities, and we share many common issues. So many of the issues they discuss apply equally to counties.

I've also visited with representatives of the news media, such as the Iowa Newspaper Association, and they have some very interesting ideas as well. Ideas that deserve a full discussion. Like the idea of creating a "public access counselor."

I will discuss some small things that would improve the laws. I will also discuss some major policy issues that the Legislature needs to consider if it is really going to take these laws apart and put them back together.

Most local officials want to do the right thing. That is why we do so much training on these laws.

The good news is that nothing the Legislature might propose is going to be all that expensive. This is not like fixing all of the aging bridges in Iowa.

Public Records

1)Public Records: The Legislature needs to rewrite the definition of “public record” to make it narrower.

If you do that, you can consider repealing some of the most rarely-used of the 59 exceptions to the public records law.

In this regard, I like Professor Bonfield’s suggestion of a four-tiered approach.

2)Investigative Files: The Legislature should repeal the change to Iowa Code section 22.7(5) made in 2006. That amendment declared that certain information in a law enforcement confidential investigative file is no longer confidential if the statute of limitations has run on the crime being investigated.

With this amendment, the confidentiality of electronic mail and phone billing records expires once the time for filing a charge has passed. This type of information (such as phone calls to confidential informants or emails from those informants) is of the same quality as other investigative materials currently not subject to time- limited confidentiality. The concerns against releasing this material after the time has passed to file a charge are no different from releasing other protected parts of the investigative information.

3)Time Limits: I agree with Professor Bonfield that the Legislature needs to establish how much time a local government has to produce a requested record. Iowa Code section 22.8 says that “good faith, reasonable delay” is allowed and shall not exceed 20 calendar days. But that is a delay to determine if a record is confidential. There is nothing in the law setting a time limit for a routine record request.

The public records audits conducted by the *Des Moines Register* and other newspapers are written as if a requested record has to be produced immediately, and if it is not produced immediately, that is a violation of the law. That is not true.

4)Commercial Records: the Legislature needs to allow local governments to charge for the copies of records to be used for commercial purposes. If a record is requested by an individual or a genealogist or a newspaper, there would be no charge. But if it is a business that wants to profit from repackaging the information, let the local government charge a commercially reasonable rate for the documents. This would save money for taxpayers. Some states, like California, Arizona and Kentucky, allow this already.

For instance, assume Glock or another gun manufacturer contacts the sheriff’s office and wants the names of all the people in the county with permits to carry concealed weapons, so they can send them an advertising flier. The sheriff should be able to charge Glock for that information. The taxpayers paid to create that list; they should have the right to get some of that money back.

One of the obvious areas where this could be used is with abstract companies, which routinely collect real estate information from county recorders’ offices, use that information for their business, and pay very little if anything for that information.

Open Meetings

The first three recommendations should be simple to accomplish.

1)Advisory Boards: The Legislature should clarify the language on advisory committees being subject to the open meetings law. Iowa Code section 21.2(1)(h) says an advisory board is subject to the open meetings law if it is "created by executive order" of a political subdivision of the state. But cities and counties don't use "executive orders." They use ordinances, resolutions, motions or amendments. The language just needs to be cleaned up.

2)24-hour Notice: Under Iowa Code section 21.4(2), notice of a meeting has to be posted "at least 24 hours" prior to the commencement of a meeting. But the Legislature needs to clarify how the law is supposed to work when you have to give 24-hours advance notice of a meeting that is going to start at 9 a.m. Monday morning. Does that mean the notice has to be posted by 9 a.m. on Friday? Does it mean that the notice can be posted at 9 a.m. on Sunday morning if someone goes and unlocks the courthouse? That certainly is contrary to the spirit of the law. That should be simple to fix. The law says when you count days, that you exclude Saturday and Sunday. But that would not actually help clarify this situation, where the law speaks about "24 hours."

3)Closed Session: The Legislature should define "closed session." Iowa Code section 21.5 lists the circumstances when a board can hold a "closed session" but does not define what that means.

Then there are some recommendations that will be more controversial.

4)Personnel Matters: The Legislature should eliminate the requirement that a local government can only close a session to discuss a personnel matter if the individual employee involved requests a closed session.

Suppose a relatively new member of the board of supervisors gets two anonymous letters accusing the county engineer of literally sleeping on the job. The county supervisor has no idea how to proceed. He does not want to make unfounded allegations public. But if the allegations are true, he does not want to alert the county engineer that he is under suspicion. Under the current law, he cannot bring this to his fellow board members for discussion in a closed session unless he gets the approval of the county engineer.

5)E-mails: The Legislature needs to clarify that emails sent from one elected official to another elected official on their private computers, even concerning government business, is not a public record. Nor does such emailing constitute a "meeting." Wherever the Legislature comes down on this issue, the whole area of email absolutely has to be addressed.

6)Publishing Board Minutes: The whole world has moved to the Internet, and Iowa's laws need to catch up. Local governments ought to be able to publish their minutes on the Internet instead of being forced to pay newspapers to publish the minutes. If you want people to read something these days, you put it on the Internet; you don't put it in 8 point type in the back of a newspaper.

7)Predecisional Discussions: Frankly the Legislature needs to allow for the possibility that there are some times government functions better if the press is not around. Board retreats are a classic example. Or where the board of supervisors want to meet with all department heads. If county supervisors cannot sit down with other elected officials and have candid discussions about problems without the press, that stifles honest communication. Too much openness can hinder the functioning of government.

One way to get at this was suggested by Professor Nick Johnson in a 2004 Drake Law Review article, where he makes a distinction for what he calls “predecisional” discussions. Johnson would say that so long as decisions are neither contemplated nor imminent, there should be no limit as to what board members may discuss in private.

8)Enforcement: Chapter 22 says that knowing violation of the public records law is a simple misdemeanor. So that would be in the purview of the county attorney or the attorney general. But it is extremely rare that someone is going to knowingly violate the public records law. And it would be awfully difficult to prove it “beyond a reasonable doubt.” So prosecutions under the public records law are rare.

Chapter 22 also allows for civil actions to enforce the public records law, and civil suits may be brought by “any aggrieved person, any taxpayer or citizen, the attorney general or any county attorney.” That’s Iowa Code section 22.10(1). So enforcement is not within the exclusive jurisdiction of the county attorney. And private citizens can get attorney fees.

In fact, when it comes to enforcing the public records law, pursuing a civil remedy makes more sense. The burden of proof is lower. And potentially the remedies can be more meaningful, including removal from office for repeated violations.

With regard to the open meetings law, Chapter 21 has no provisions making a violation of the open meetings law criminal. So the county attorney could not even go there if he or she wanted to.

Chapter 21, just like chapter 22, allows for civil actions to enforce the open meetings law, and civil suits may be brought by “any aggrieved person, any taxpayer or citizen, the attorney general or any county attorney.” 21.6. So enforcement is not by any means within the exclusive jurisdiction of the county attorney. And private citizens can get attorneys fees.

But if some believe that there have not been enough enforcement actions regarding these two laws, county attorneys do not have sole responsibility regarding enforcing these laws. Not at all.

9)Rolling Quorums: It is rare that local boards attempt to circumvent the law in this fashion. The problem with trying to prohibit rolling quorums is that the legislation is necessarily so broad that it always has unintended consequences. It reaches conduct that is perfectly legal. And has a chilling effect on perfectly legal discussions between board members.

ISAC appreciates this opportunity to participate in the discussion of these important issues, and stands ready to work with the Legislature on addressing the problems with the current laws.